

FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v Brar [2012] FCAFC 30

Citation:	Minister for Immigration and Citizenship v Brar [2012] FCAFC 30
Appeal from:	Brar v Minister for Immigration & Anor [2011] FMCA 435
Parties:	MINISTER FOR IMMIGRATION AND CITIZENSHIP v MANJINDER SINGH BRAR and MIGRATION REVIEW TRIBUNAL
File number:	NSD 1370 of 2011
Judges:	NORTH, GREENWOOD AND BESANKO JJ
Date of judgment:	21 March 2012
Catchwords:	MIGRATION - STATUTORY INTERPRETATION – appeal from orders of Federal Magistrates Court on judicial review – construction of ss 103 and 107 of <i>Migration Act 1958</i> (Cth) – whether failure to identify correct recipient under s 103 fatal to s 107 notice for purposes of cancellation of visa under ss 108 and 109. Held: Appeal allowed – proceeding remitted to the Federal Magistrates Court to consider other grounds of application for judicial review – ss 107 and 108 should be read in light of the statutory purpose to ensure procedural fairness through provision of sufficient particulars of alleged non-compliance. MIGRATION – STATUTORY INTERPRETATION – consideration of requirements of 359A(1) – whether information and invitation given by Migration Review Tribunal misleading Held: Appeal allowed – s 359A(1) requires only that clear particulars of information the Tribunal considers would lead to affirmation of decision under review be given – inclusion of additional information or finding of fact does not result in non-compliance.
Legislation:	<i>Migration Act 1958</i> (Cth) ss 5, 97, 101, 103, 107, 109, 359A <i>Migration Amendment (Border Integrity) Act 2007</i> (Cth) <i>Migration Regulations 1994</i> (Cth) reg 1.03

Cases cited:	<i>Minister for Immigration and Citizenship v Chamnam You</i> [2008] FCA 241, cited <i>Minister for Immigration and Citizenship v SZIZO</i> (2009) 238 CLR 627, cited <i>Minister for Immigration and Multicultural Affairs v McDade</i> (2001) 109 FCR 137, cited <i>Saleem v Migration Review Tribunal</i> [2004] FCA 234 <i>SHJB v Minister for Immigration and Multicultural Affairs</i> [2003] FCAFC 330, cited <i>SZBYR v Minister for Immigration and Citizenship</i> (2007) 81 ALJR 1190, cited <i>SZJBD v Minister for Immigration and Citizenship</i> (2009) 179 FCR 109, cited <i>VAF v Minister for Immigration and Multicultural and Indigenous Affairs</i> (2004) 206 ALR 471, cited <i>Zhao v Minister for Immigration and Multicultural Affairs</i> [2000] FCA 1235, cited <i>Zhong v Minister for Immigration and Citizenship</i> (2008) 171 FCR 444, cited
Date of hearing:	15 November 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	77
Counsel for the Appellant:	Mr N Williams SC and Mr T Reilly
Solicitor for the Appellant:	Sparke Helmore
Counsel for the First Respondent:	Mr J Young
Solicitor for the First Respondent:	Shamser Thapa & Associates
Counsel for the Second Respondent:	The Second Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1370 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
Appellant**

**AND: MANJINDER SINGH BRAR
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGES: NORTH, GREENWOOD AND BESANKO JJ

DATE OF ORDER: 21 MARCH 2012

WHERE MADE: CANBERRA VIA VIDEO LINK WITH SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The declarations and orders made by the Federal Magistrates Court on 28 July 2011 be set aside.
3. The proceeding be remitted to the Federal Magistrates Court for hearing and determination of the remaining grounds of the applicant's Amended Application dated 17 May 2011, being grounds 1, 2, 5, 6, 7, 9 and 10 and the costs of that application including costs to date.
4. The respondent pay the appellant's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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**BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
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**AND: MANJINDER SINGH BRAR
First Respondent**

**MIGRATION REVIEW TRIBUNAL
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JUDGES: NORTH, GREENWOOD AND BESANKO JJ

DATE: 21 MARCH 2012

PLACE: CANBERRA VIA VIDEO LINK WITH SYDNEY

REASONS FOR JUDGMENT

THE COURT

- 1 1 This is an appeal by the Minister for Immigration and Citizenship against orders made by the Federal Magistrates Court on 28 July 2011.
- 2 2 The Federal Magistrates Court heard and determined an application for judicial review by Mr Manjinder Singh Brar who is the first respondent to this appeal. The first respondent sought relief in relation to a decision made by the Migration Review Tribunal (“the Tribunal”) on 7 March 2011.
- 3 3 The Federal Magistrates Court allowed the first respondent’s application and made the following orders:
 - (1) The Court declares that the notice of incorrect application issued pursuant to s.107 of the *Migration Act 1958* (Cth) to the applicant contained a false particular of possible non compliance in that the notice wrongly asserted that the applicant had provided a bogus document to an ‘officer’ as defined in s.5 of the Migration Act.
 - (2) The Court declares that the notice issued pursuant to s.107 did not enliven the power purportedly exercised under s.109 of the *Migration Act 1958* (Cth) to cancel the applicant’s visa.

- (3) The first respondent is restrained from relying upon the decision of the delegate made on 12 October 2010 to cancel the applicant's visa.
- (4) A writ of certiorari shall issue, removing the record of the decision of the Migration Review Tribunal made on 7 March 2011 into this Court for the purpose of quashing it.
- (5) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application in the sum of \$6,240 in accordance with rule 44.15(1) and item 1(c) of part 2 of Schedule 1 of the *Federal Magistrates Court Rules 2001* (Cth).

4 4 The Tribunal was the second respondent to the appeal but it took no active part in the appeal. In the circumstances it is convenient to refer to the first respondent as the respondent.

THE FACTS

Background and the Delegate's decision

5 5 The respondent is a 27 year old male who is a citizen of India. He came to Australia in 2006. On 24 May 2008 he applied for a Skilled Residence-Sponsored Class VB subclass 886 visa. His application consisted of a pro-forma application form which had been completed and a letter with enclosures from his immigration agent. The letter which was dated 24 May 2008 was addressed to "The Department of Immigration and Citizenship, Adelaide Skilled Processing Centre, GPO Box 1638, Adelaide SA 5001".

6 6 One of the enclosures with the letter dated 24 May 2008 was a letter from an organisation called Trades Recognition Australia (Department of Education, Employment and Workplace Relations) ("TRA") dated 6 February 2008. The TRA letter stated that the respondent's application for skills assessment of his training or work experience, or both, for the purposes of migration to Australia had been successful. The TRA letter stated that the organisation was satisfied on the evidence provided that the respondent had "900 hours directly related work experience". The evidence provided appears to have been a document from the owner of a business called Dom's Family Bistro and Pizza of Thomastown, Victoria which stated that the respondent had undertaken more than 900 hours unpaid work experience as a cook at Dom's Family Restaurant ("Dom's") between 21 December 2008 and 28 December 2007. The Tribunal found that the respondent had lodged his application on an online system.

On 31 March 2009 the respondent was granted a Skilled Residence-Sponsored Class VB subclass 886 visa (“the visa”).

It appears that late in 2009 the Department of Immigration and Citizenship (“the Department”) received information which supported a conclusion that the information from Dom’s in relation to the respondent was false. A delegate of the Minister considered that there had been, or may have been, non-compliance with ss 101(b) and 103 of the *Migration Act 1958* (Cth) (“the Act”). The Delegate decided to serve a notice under s 107 of the Act of an intention to consider cancellation of the respondent’s visa under s 109 of the Act and that was done by letter dated 30 June 2010. There is a suggestion in both the reasons of the Delegate and the reasons of the Tribunal that subsequent notices were served on the respondent by email, but the application for judicial review before the Federal Magistrates Court and the appeal to this Court were conducted by both parties on the basis that the relevant notice for the purposes of s 107 of the Act was the letter from the Delegate dated 30 June 2010.

The letter under s 107 referred to non-compliance or possible non-compliance by the respondent with ss 101(b) and 103 of the Act. The letter stated that on 24 May 2008 the respondent had “lodged an application for a Skilled Residence-Sponsored Class VB subclass 886 visa at an onshore processing centre ...”. The central allegation that the work reference letter from Dom’s was fraudulently obtained was fully particularised in the letter. As far as possible non-compliance with s 103 was concerned, the letter stated as follows:

Section 103 – Evidence of non-compliance

The department finds that the work reference letter from Dom’s Family Bistro & Pizza was fraudulently obtained. You then provided the fraudulent work reference to TRA for your pre-migration skills assessment. The skills assessment was obtained through false and misleading statements and therefore is considered to be a bogus document within the meaning of section 97 of the Act.

You then presented the positive skills assessment from TRA *to an officer of the department* who was performing a function under the Act (that function being assessing the client’s visa application).

In giving the bogus TRA skills assessment, to an officer of the department, you have failed to comply with section 103.

The words we have italicised are significant in terms of one of the principal arguments on the appeal.

10 10 The respondent replied to the Delegate's letter by a letter with enclosures from his solicitors dated 19 July 2010. The enclosures included a statutory declaration from the respondent stating, among other things, that he had worked at Dom's from December 2006 to December 2007.

11 11 The Delegate found that the respondent had failed to comply with ss 101(b) and 103 of the Act and, on 12 October 2010, she decided to cancel the respondent's visa. The Delegate advised the respondent of her decision by letter dated the same date.

The application before the Tribunal and its reasons

12 12 On 19 October 2010 the respondent applied to the Tribunal for a review of the Delegate's decision. He attached to his written application for review the Delegate's letter dated 12 October 2010 and a copy of the decision record signed by the Delegate.

13 13 On 19 November 2010 the Tribunal wrote to the respondent giving him the opportunity to comment on information which the Tribunal considered "would, subject to [the respondent's] comments or response, be the reason, or a part of the reason, for affirming the decision under review". That letter was sent pursuant to s 359A of the Act. It is necessary to set out certain passages in this letter because the appellant challenges a conclusion by the Federal Magistrate that the Tribunal failed to comply with s 359A of the Act.

14 14 The Tribunal's letter dated 19 November 2010 relevantly provided as follows:

Invitation to comment on or respond to information

In conducting its review, the Tribunal is required by the Migration Act to invite you to comment on or respond to certain information which the Tribunal considers would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

Please note, however, that the Tribunal has not made up its mind about the information.

The particulars of the information are:

You are invited to comment on the particulars of information that would, subject to any comments you may offer, be the reason or part of the reason for affirming the decision under review, namely:

- (a) that you were not employed as a cook or in any capacity from 21 December 2006 to 28 December 2007 or at any other time at Dom's Family Bistro and Pizza ('Dom's'), contrary to the claims made in a purported work reference submitted in support of your application for a skills assessment by Trades Recognition Australia (TRA);
- (b) that in the course of an interview with Departmental investigators in November 2009, an individual who was highly placed in the provision of cookery training to international students admitted to receiving cash payments from numerous visa applicants for fabricating employment references on their behalf, and paying the owners of Dom's and other businesses between \$300 and \$400 for their signatures on each such document. Hundreds of false work references were found at the residence of this individual, who confirmed that no international students had worked at these businesses;
- (c) that the abovementioned purported work reference procured at your request by the intermediary and signed by the owner of Dom's, which falsely asserted that you had completed over 900 hours of supervised relevant work experience at that establishment, was knowingly submitted by you to Trades Recognition Australia (TRA), from which you duly received a favourable skills assessment;
- (d) that knowing that the favourable TRA skills assessment had been obtained fraudulently on the basis of a non-genuine work reference and non-existent work experience, you submitted the TRA skills assessment, a bogus document within the meaning of s.97(c) of the Act, to the Department in support of your subclass 886 visa application.

This information would be the reason or part of the reason for affirming the decision under review because in assessing your claims for a subclass 886 visa, the delegate assigned you 60 points in the general points test (GPT) for having a skilled occupation (Cook – ASCO Code 4513-11) which, in conjunction with points assigned for other relevant attributes, resulted in your obtaining an overall score in the GPT of 120 points, which equated with the qualifying score at the relevant time. Without the falsely claimed work experience attested to in the purported work reference mentioned above, you would not have received the favourable, but bogus, TRA skills assessment as a cook. Without the bogus TRA skills assessment, you would not have been awarded 60 points in the GPT and would not have achieved the pass or pool marks. Consequently, your application for a subclass 886 visa, and indeed for any other visa within the Class VB, would not have been successful, and you would not have acquired permanent residence.

15 15 The respondent provided his comments and response to that invitation by letter from his solicitors dated 24 November 2010.

16 16 The Tribunal held a hearing on 7 March 2011 and it heard evidence from the respondent and one of his friends. The Tribunal decided to affirm the decision to cancel the respondent's visa and it delivered written reasons for that decision.

17 17 Having regard to the grounds of the appeal to this Court it is not necessary to
identify all of the Tribunal's conclusions.

18 18 The Tribunal found that the Delegate had reached the necessary state of mind
to engage s 107 of the Act and that the notice from the Delegate under s 107 complied with
the statutory requirements. The Tribunal then turned to consider whether there had been non
compliance by the respondent in the way described in the notice. The Tribunal described what
it considered to be the critical question in the following terms:

... whether the applicant did or did not work at Dom's as he claims, and as was
claimed in a purported work reference that was submitted to TRA to support a skills
assessment. It appears to be common ground that, absent that work experience, the
positive assessment would not have been issued, and that as a consequence, the
applicant would not have been awarded 60 points in the GPT, and would not have
been granted the visa.

19 19 The Tribunal considered the evidence before it, including evidence from the
respondent and his friend. Two passages from the Tribunal's reasons are important because of
the appellant's challenge to the Federal Magistrate's conclusion that the Tribunal failed to
comply with s 359A of the Act. Those two passages are as follows:

The Tribunal has seen evidence that in the course of an interview with Departmental
investigators in November 2009, an individual who was highly placed in the
provision of cookery training to international students admitted to receiving cash
payments from numerous visa applicants for fabricating employment references on
their behalf, and paying the owners of Dom's and other businesses between \$300 and
\$400 for their signatures on each such document. Hundreds of false work references
were found at the residence of this individual, who confirmed that no international
students had worked at these businesses.

The applicant has disputed the inference that his purported work reference was also
false, and claimed that, unlike the students who purchased false work references from
Dom's via the corrupt intermediary, his was obtained honestly, and that he did in fact
work there for 900 hours over 12 months, as claimed in the reference document. The
Tribunal does not accept that claim, and finds that the reference was fraudulent, and
that the applicant was never employed at Dom's as claimed. The Tribunal does not
accept that the applicant, a resident of West Footscray, just happened upon Dom's,
which is one of a small number of similar businesses that was widely known to be
heavily involved in the provision of false work references for international students,
while en route to visit a friend in Thomastown, and just decided on an impulse to go
in and ask for work experience. The Tribunal rejects the belated claim that a friend,
Mr Maan, drove him to work and collected him on a few occasions. The Tribunal
rejects as irretrievably implausible the applicant's claim that he never mentioned this
vital evidence to the Department or to this Tribunal before because it slipped his
mind. Moreover, the Tribunal found Mr Maan himself, cautioned or not, an evasive
and untrustworthy witness, and gives his faltering and clumsily constructed claims no
credence whatever.

20 20 The Tribunal then reached the following conclusion:

After carefully considering the available evidence, the Tribunal finds that the applicant did not work at Dom's in any capacity, paid or otherwise, during the period claimed in the purported work reference, which is fraudulent, and was obtained from an intermediary in exchange for money paid by the applicant for that purpose. The Tribunal finds that the purported work reference was subsequently presented to TRA by or on behalf of the applicant, and was a *condition sine qua non* of his obtaining the positive skills assessment by TRA that he then presented to the Department in support of his subclass 886 visa application. The Tribunal therefore finds that the TRA skills assessment was a bogus document within the meaning of s.97(c) of the Act.

21 21 The Tribunal then said that it was satisfied "to the required degree" that the respondent had failed to comply with s 103 of the Act in the way described in the notice under s 107.

22 22 It is convenient at this point to note the terms of s 103 of the Act:

A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

23 23 Section 97 defines the term "bogus document" to include a document that the Minister reasonably suspects is a document that was obtained because of a false or misleading statement, whether or not made knowingly.

24 24 A passage from the Delegate's letter under s 107 is set out above (at [9]). It referred to the TRA letter being presented *to an officer of the department*. The Tribunal addressed the issue of the entity to whom the bogus document was presented. It said:

The Tribunal acknowledges that the s.107 notice inaccurately described the applicant's breach of s.103 as involving the provision of a bogus document 'to an officer of the Department', whereas it was in fact presented to an authorised system, having been lodged online. However, the Tribunal does not consider that this minor, technical imprecision on the part of the delegate prevented the applicant from knowing or answering the case against him, or that the s.107 notice should therefore be declared invalid. Whilst the courts have properly and understandably stressed the need for breach allegations to be soundly particularised in s.107 notices, their approach in gauging compliance with that precept has always been purposive rather than prescriptive. The Tribunal emulates that approach in dealing with the present matter.

25 25 The Tribunal's reasoning in the above passage seems to be that as the bogus document was lodged online it must have been presented to an authorised system rather than an officer of the Department. This issue appears to have been one that was raised and considered by the Tribunal itself rather than the respondent. In fact, as we shall see, before the Federal Magistrates Court the respondent alleged that there was no evidence that the online system was an authorised system.

26 26 The Tribunal then considered the exercise of the discretion under s 109 of the Act. It decided that issue against the respondent and, accordingly, affirmed the decision of the Delegate to cancel the respondent's visa.

The reasons of the Federal Magistrate

27 27 The respondent issued his application for judicial review on 28 March 2011. In an Amended Application dated 18 May 2011 he raised ten grounds of review which were in the following terms:

1. The second Respondent made a jurisdictional error in that there was a reasonable apprehension of bias by reason of:
 - (a) The second Respondent readily accepted information given in an interview from an unnamed individual who was on his own admission perpetrating fabricated work references and involved in fraud while treating sworn evidence from the applicant and his witness with scepticism and overzealous scrutiny.
 - (b) The form and content of the section 359A notice set out in ground 3 below.
2. In the alternative to 1 above, the Second Respondent made jurisdictional error by adopting an inappropriate onus on the applicant and witness for him stating that the credibility of everyone associated with the application would be subject to scrutiny (while plainly not adopting such scrutiny in relation to information and inferences from information given by an immigration fraudster).
3. The second Respondent made jurisdictional error by failing to comply with the requirements of section 359A of the Migration Act 1958.

Particulars:

- a) The notice did not set out clear particulars of information as required but treated or included conclusions on matters which at that point of the inquiry the Second Respondent was not entitled to make conclusions as if it were information.

- b) The Second Respondent did not comply with its statutory obligations under s 359A(i)(a), (b) or (c).
- 4. The second Respondent made jurisdictional error by treating errors in the section 107 notice in relation to particulars as being capable of being waived by the Second Respondent on the basis of a general purposive approach to incorrect particulars in section 107 notice.
- 5. The second Respondent failed to comply with section 425 of the Migration Act in that the Second Respondent made only passing reference of the 'central allegation' of whether the applicant had worked for Dom's as he claimed.
- 6. The Second Respondent made jurisdictional error by demonstrating in the Section 359A letter and at hearing a reasonable apprehension of bias in that the Second Respondent pre-judged issues of whether the applicant had been employed at Dom's and whether he had sought out the services of a corrupt individual to manufacture a work reference.
- 7. The Second Respondent made findings of fact that the applicant had sought out the services of a corrupt individual to manufacture a work reference:
 - (a) in breach of section 425 and the principles of procedural fairness
 - (b) where there was no evidence to support such finding
- 8. The Second Respondent made jurisdictional error by findings that TRA skill assessment document had been presented to an authorised system where there was no evidence that the online system was an automated system authorised in writing for the purposes of Section 103.
- 9. The Second Respondent failed to have regard to the contribution made by the applicant in employment not merely as a 'migrating factor' but as a matter required to be taken into consideration under r 2.41(K) of the Migration Regulations.
- 10. The Second Respondent failed to apply Reg.2.41 of the Regulations where it found no evidence of certain matters under paragraphs (f), (g), and (j) of Reg. 2.41 and failed to apply Reg. 2.41 by indicating in respect of each paragraph whether the factor was positive, neutral or negative in the decision making process.

28 28 The Federal Magistrate addressed grounds 3 and 4 in his reasons and he made some comments which were relevant to ground 8 (*Brar v Minister for Immigration and Anor* [2011] FMCA 435). He found in favour of the respondent in relation to both grounds 3 and 4. He did not consider the other grounds of review, although he did make some observations about the apparent bias allegation at the end of his reasons.

29 One preliminary point must be made. Although, on the review the Tribunal referred to “egregious” breaches of ss 101 and 103 of the Act, its express finding having regard to the evidence before it was that the respondent had failed to comply with s 103. On the application for judicial review the Federal Magistrate addressed a failure to comply with s 103 and, for whatever reason, the alleged non-compliance with paragraph 101(b) appears not to have been pressed.

30 We will address the Federal Magistrate’s reasons with respect to ground 4 first and for convenience we will refer to it as the s 107 notice issue.

31 Ground 8 raised a point which was related to the s 107 notice issue. As we understood it, ground 8 embodied a contention by the respondent that as the bogus document had been lodged online it had not been presented to an officer within s 103. Furthermore, as there was no evidence before the Tribunal that the relevant online system had been authorised in writing as required by the definition of authorised system in s 5 of the Act, it had not been proved that it had been presented to an authorised system. It followed from those propositions that there was no evidence that the document had been presented either to an officer or an authorised system.

32 Senior counsel for the appellant told the Court that the appellant’s approach before the Federal Magistrates Court was that it did not matter whether or not the online system was an authorised system because ultimately the bogus document would have been presented to an officer or found its way to an officer. In those circumstances, the appellant did not seek to prove before the Federal Magistrate that the online system was not an authorised system.

33 The Federal Magistrate dealt with the issue of whether the bogus document was presented to an officer or to an authorised system in the following way. He first adopted the Tribunal’s conclusion that the assertion that the respondent had given incorrect information or a bogus document to an officer of the Department was wrong because the information had been provided to an online system. He then noted that he had no evidence on whether the online system had been authorised in writing by the Minister or the Secretary for the purposes of s 103. Nevertheless, he said that he would proceed on the basis that the online system had been so authorised (at [16] and [18]).

34 34 Accordingly, the Federal Magistrate proceeded to consider the s 107 notice
issue on the basis that the bogus document had been given to an authorised system whereas
the notice under s 107 of the Act had stated that it had been presented to an officer.

35 35 The Federal Magistrate noted the definitions of “officer” and “authorised
system” in s 5 of the Act and it is convenient to set out those definitions at this point.

officer means:

- (a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph;
or
- (b) a person who is an officer for the purposes of the Customs Act 1901, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or
- (c) a person who is a protective service officer for the purposes of the Australian Federal Police Act 1979, other than such a person specified by the Minister in writing for the purposes of this paragraph; or
- (d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or
- (e) a member of the police force of an external Territory; or
- (f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or
- (g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.

authorised system, when used in a provision of this Act, means an automated system authorised in writing by the Minister or the Secretary for the purposes of that provision.

36 36 His Honour said that there was a significant difference between “officer” and
“authorised system” as those terms were defined in the Act and that the difference was as
significant as the difference between “the Minister” and “a tribunal” referred to in s 103. He
considered the authorities and, in particular, *Zhong v Minister for Immigration and
Citizenship* (2008) 171 FCR 444 (“*Zhong v Minister for Immigration and Citizenship*”) and
he said that a notice which did not comply with s 107 was not a valid notice. He said that a
notice which contained particulars of a non compliance ground which were “materially false
or misleading” could not support a visa cancellation based on the “false or misleading
particulars”.

37 37 The Federal Magistrate expressed his conclusions in the following way (at
[23]):

I find that the notice provided to Mr Brar was false in a material particular in that it asserted he had given a bogus document to an 'officer' as defined when he had not done so. The notice was validly issued as the requirements of s.107 were met and the particulars were sufficiently clear for Mr Brar to respond but because the ground of non compliance was incorrectly framed, it could not support the cancellation decision of the delegate. It was not open to the Tribunal to gloss over the error and effectively re-frame the breach asserted against Mr Brar. While the Tribunal can no doubt review purported as well as valid decisions, the question of whether a notice issued purportedly under s.107 complies with that section is a jurisdictional question for the Court, as is conceded by the Minister. Further, the Tribunal cannot affirm a cancellation decision on a ground other than that set out in the notice. Neither could the delegate have done so. If Mr Brar had pointed out the error to the delegate, a fresh notice would have been required as only one ground of non compliance was alleged against him. He pointed out the error to the Tribunal which lacked jurisdiction to correct it. In affirming the purported cancellation decision the Tribunal committed a jurisdictional error and Mr Brar is entitled to relief in the form of the constitutional writ of certiorari and an injunction. I will also make declarations.

38 38 The Federal Magistrate went on to say that, even if he was wrong with respect to the s 107 notice issue, the respondent was entitled to succeed in relation to ground 3, namely, that the Tribunal had failed to comply with s 359A of the Act. We will refer to this issue as the s 359A issue. Section 359A of the Act is in the following terms:

- (1) Subject to subsections (2) and (3), the Tribunal must:
 - (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
 - (c) invite the applicant to comment on or respond to it.
- (2) The information and invitation must be given to the applicant:
 - (a) except where paragraph (b) applies--by one of the methods specified in section 379A; or
 - (b) if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.
- (3) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.
- (4) This section does not apply to information:

- (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or
- (b) that the applicant gave for the purpose of the application for review; or
- (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or
- (c) that is non-disclosable information.

39 39 The Federal Magistrate set out those passages from the Tribunal's letter dated 19 November 2010 which he considered to be relevant to the question of compliance with s 359A. The passages he set out were paragraphs (a)-(d) and the introduction to those paragraphs (see [14] above).

40 40 The Federal Magistrate said that the matters in paragraphs (a), (c) and (d) of the Tribunal's letter were not "information" within subsection 359A(1) of the Act but "the Tribunal's own thought processes based on inferences derived from the information then available to the Tribunal". He said that the "only relevantly adverse information the Tribunal had at the time the letter was issued was the information referred to in paragraph (b)". He said that the Tribunal did not have any information that the respondent was a member of the class of persons provided with false work references by the owner of Dom's, nor did it have any information that he had not worked at Dom's as he asserted apart from the general assertion of the informant that no international students had worked at Dom's.

41 41 The Federal Magistrate's reasoning was as follows. Subsection 359A(1) draws a distinction between information (paragraph (a)) and the reasons why it is relevant to the review (paragraph (b)). The Tribunal's letter conflated the two matters because the matters in paragraphs (a), (c) and (d) of its letter dated 19 November 2010 were described in the letter as information whereas in fact they were reasons why the information in paragraph (b) of the letter was relevant to the review. This resulted in the Tribunal's letter being "seriously misleading" because it suggested to the respondent that the Tribunal had information which of itself established that he had not worked at Dom's between December 2006 and December 2007 and that he had obtained the work reference letter from Dom's from the person referred to by the Tribunal as the "intermediary". It followed, said the Federal Magistrate, that the

Tribunal had not complied with s 359A of the Act and that this was a “further jurisdictional error”.

ISSUES ON THE APPEAL

The s 107 notice issue

42 42 With respect to the s 107 notice issue, the appellant put two alternative submissions. First, he submitted that it is open to him on the appeal to establish that the online system was not an “authorised system” within s 5 of the Act and that in those circumstances the appropriate inference of fact is that the bogus document was presented to an officer. If that was accepted, there was no disparity between the allegation in the notice under s 107 and the facts. The appellant went so far as to argue that it was open to him to establish that in fact the bogus document had not been lodged online, but had been given to the Department or sent to it by post. The appellant submitted that the issue of whether the bogus document was given or presented or provided to an officer or an authorised system was a jurisdictional fact and that a court determining a judicial review application was required to decide the fact for itself on admissible evidence. The appellant also submitted that the Federal Magistrates Court, by assuming the jurisdiction to make the declarations and injunction and, in particular, the first declaration, was required to determine the fact for itself. Secondly, the appellant submitted that even if the appellant is unable to challenge the finding that the bogus document was presented to an authorised system, nevertheless, the Federal Magistrate erred in concluding that the notice under s 107 did not engage the power in s 109 of the Act.

43 43 Section 103 of the Act is set out above (at [22]). Section 107 of the Act provides that the Minister *may* give the holder of a visa a notice under the section. It was common ground that the Minister may delegate the powers in ss 107, 108 and 109 of the Act and when we refer to the Minister in the discussion that follows that includes a reference to his or her delegate. The Minister may give a notice under s 107 if he or she considers that the holder of the visa did not comply with, inter alia, s 103 of the Act. Section 107 is in the following terms:

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

- (a) giving particulars of the possible non compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non compliance:
 - (A) give reasons for the non compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
- (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.

- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

44 44 Although the Minister has a discretion whether or not to give a notice under s 107, the giving of such a notice is a condition of the power to cancel a visa under s 109. That follows from the terms of ss 108 and 109 which are as follows:

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder *in the way described in the notice*.

(Emphasis added.)

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
- (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
- may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the circumstances in which a visa must be cancelled.

45 45 The Minister's power to cancel a visa under s 109 only arises if the Minister decides under s 108 that there has been non-compliance by the holder of the visa. By reason of s 108 the Minister's inquiry is limited to the question of whether there was non-compliance *in the way described in the notice*. In other words, it would be beyond the Minister's power to inquire into whether there was non-compliance in a way not described in the notice. In this way the giving of a notice under s 107 becomes a key step in the process which may lead to the cancellation of a visa under s 109 and performs the function of providing the procedural fairness identified in s 107 to the holder of the visa. If the notice under s 107 does not describe the non-compliance, or if the Minister decides that there has been non-compliance in a way not described in the notice, then the Minister has exceeded the power given in s 108 and s 109.

46 46 Senior counsel for the appellant argued on the appeal that it was quite clear that the bogus document had been given to an officer and not an authorised system. He referred the Court to the definition of "Internet application" in reg 1.03 of the *Migration Regulations 1994* (Cth). He also referred the Court to the amendment which introduced the concept of "authorised system" being the *Migration Amendment (Border Integrity) Act 2007* (Cth) and he made submissions as to what he said was the clear purpose of the amendment. That purpose was, he submitted, quite unrelated to the making of an internet application. He attached to his written reply to the respondent's written submissions what he contended was the only authorisation of an inbound automated processing system (that is, authorised system) being a system called "Smartgate". His analysis does seem to make it clear that the online system which was used by the respondent to make his application was not an authorised system. If that conclusion is correct, then the appellant submitted that, in the absence of direct evidence, the appropriate inference is that the bogus document was presented to an officer.

47 47 The difficulty with the appellant's argument is two-fold. First, he must show that the issue of whether the bogus document was presented to an officer or to an authorised system was a jurisdictional fact so that the Federal Magistrates Court had to decide the fact for itself. Secondly, even if he overcomes that difficulty he must show that he ought to be permitted to raise the point in this Court and call evidence if necessary. In our opinion, the appellant fails on the first point and it is not necessary to consider the second point.

48 In *Saleem v Migration Review Tribunal* [2004] FCA 234 (“*Saleem*”) Allsop J decided, correctly in our respectful opinion, that the Tribunal, like the Minister, had to decide whether there had been non-compliance for the purposes of s 108(b). His Honour said (at [22]):

When the Tribunal comes to the review of the decision to cancel the visa it too must decide whether there has been non-compliance for the purposes of s 108(b). I reject the proposition that it is limited in its function to the exercise of the discretionary power in s 109. That would be an approach contrary to the notion of a full merits review provided for by the Act. Nothing in *SHJB* demands to the contrary.

49 The Full Court of this Court considered the question of what facts are jurisdictional facts under ss 108 and 109 of the Act in *SHJB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 330 (“*SHJB*”). The principal question before the Court was whether the fact of non-compliance by a visa holder in the way described in the notice was a jurisdictional fact so that a Court hearing an application for judicial review must decide the fact for itself. The Court answered that question in the negative and said that the relevant jurisdictional fact was a decision by the Minister that there was non-compliance by the holder of the visa with the requirements of s 108. The Minister or Tribunal’s decision could be attacked on the basis that it was not supported by some probative material or logical grounds. The Court’s reasons for reaching those conclusions were as follows (at [14]-[22]):

The first [ground of appeal] was that the question of non-compliance with s 101 was a ‘precedent fact’, which, on review, should be determined by the Court. The appellant submitted that the learned primary judge had erred in failing to hold that the actual existence (as opposed to the Tribunal’s ‘mere satisfaction’) of non-compliance by him was a condition upon which the Tribunal’s jurisdiction under s 109 depended. That is, that the fact of non-compliance was a ‘jurisdictional fact’. The appellant contended that the primary judge should have determined for himself, on the admissible evidence before the Court, whether there had been ‘non-compliance by the visa holder in the way described in the notice’.

Counsel for the appellant then took us to the authorities relating to situations in which a Court, on judicial review, was obliged to determine for itself the jurisdictional fact upon which the administrative decision-maker’s jurisdiction depended.

It seems to be common ground, and we agree, that the principles in this area are well established. It is sufficient to refer to *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135.

However, in our view the appellant has wrongly identified the jurisdictional fact which gives rise to the power conferred by s 109(1). In our opinion, the relevant jurisdictional fact is to be found by a proper construction of ss 108(b) and 109(1)(a). The jurisdictional fact is a decision by the Minister that there was non-compliance by the holder of the visa with the requirements of s 108. That decision gives rise to the

power to cancel the visa.

That fact (the decision that there was non-compliance with s 101) is probably “a fact” which falls outside the ordinary meaning of that term, to use the words of Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]. As his Honour pointed out in the immediately following paragraphs, such a decision is reviewable under s 75(v) of the Constitution.

But in conducting such a review, the Court’s function is not to decide, as the appellant submits, whether he did in fact fail to comply with s 101. In that regard, this case differs from the statutory regime in *Enfield*, where the relevant power (one untrammelled by the requirement of consent from the local council) simply did not exist if the proposed development was for ‘special industry’ – see the joint judgment at [33] to [39].

Similarly, in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, a decision on which the appellant relied quite heavily, the jurisdictional fact was whether the relevant development was ‘... likely to significantly affect threatened species, populations or ecological communities, or their habitats ...’. In such circumstances, s 77(3)(d1) of the Environmental Planning and Assessment Act 1979 (NSW) required the development application to be accompanied by a species impact statement. The New South Wales Court of Appeal so held, as a matter of statutory construction, noting that the decision about the existence or not of a jurisdictional fact may (as in that case) involve the exercise of judgment. But the existence of the jurisdictional fact was to be ascertained objectively; the opinion of the consent authority was not determinative: see Spigelman CJ (with whom Mason P and Meagher JA agreed) at [81] to [94].

We would distinguish the present case from *Timbarra*, because the statutory requirements are expressed in a basically different manner. Parliament has decided that the jurisdictional fact is not whether the appellant failed to comply with s 101, but whether the respondent’s officer or the Tribunal had decided that there was such non-compliance.

The first question in this appeal is whether his Honour erred in finding that there was material before it that justified the Tribunal’s conclusion. Or, to adapt the language of Gummow J in *Eshetu* at [145], was the satisfaction of the Tribunal based on findings or inferences of fact which were not supported by some probative material or logical grounds? In our view, the answer to both questions is no. One has only to refer to the material from the Organisation for Registration and the Directorate of Registration of the Ministry of Interior of the Government of Pakistan and compare that with some of the information given by the appellant in his application for a protection visa about the names of some of the members of his immediate family. The appellant criticised the official records from Pakistan as containing some inconsistencies. In our opinion, those criticisms go, impermissibly, to matters of weight or the merits. There was plenty of other information upon which the Tribunal relied and upon which it was, in our view, entitled to rely.

51 51 The question of whether the bogus document was given, presented or provided to an officer or to an authorised system is not a jurisdictional fact. It is part of the issue of non-compliance and in the same way as the question of whether a document is a bogus document is not a jurisdictional fact (*SHJB*) so also is the issue of the person or entity to whom the document was given not a jurisdictional fact.

52 52 The appellant submitted that even if the question of whether the bogus document was given, presented or provided to an officer or to an authorised system was not a jurisdictional fact for the purposes of an application for constitutional writs, it was a jurisdictional fact for the purposes of the jurisdiction to grant declarations and injunction and, in particular, the first declaration. Although there is force in that submission, at least as far as the first declaration is concerned, the difficulty with it is that, in our opinion, on any view of the merits the first declaration ought not to have been made. The issue before the Federal Magistrate was not whether the notice under s 107 contained a false particular or wrongly asserted a matter or thing. The issue was whether there was non-compliance by the visa holder in the way described in the notice. We reject the appellant's first submission with respect to the s 107 notice issue.

53 53 We turn to the second submission which is to be determined on the basis that the bogus document was in fact presented by the respondent to an authorised system and not, as stated in the notice under s 107, to an officer. The appellant submitted that the Federal Magistrate erred in concluding that this departure from the notice was fatal to the jurisdiction under s 108 to decide that there had been non-compliance with a relevant section in the Act.

54 54 In *Minister for Immigration and Multicultural Affairs v McDade* (2001) 109 FCR 137 at 146 [34] the Full Court of this Court noted that the decision for the Minister under s 108 was not whether there was non-compliance by the visa holder with, for example, s 101, but whether there was non-compliance by the visa holder in the way described in the notice. In *Zhong v Minister for Immigration and Citizenship* at 460 [81] Lander J said that the giving of a notice which complies with s 107 of the Act is a statutory precondition to the exercise of the Minister's or delegate's power to cancel a visa under s 109.

55 55 In this case there was a notice under s 107 of the Act and, on the face of it, that notice sets out the matters it was required to contain by reason of s 107. The question which

this particular case raises is whether the Federal Magistrate erred in concluding that the Tribunal exceeded its jurisdiction in finding that there had been non-compliance in the way described in the notice.

56 A notice under s 107 of the Act is not a criminal charge or a pleading in a civil action. The notice must contain, among other things, particulars of possible non-compliance and then the decision-maker under s 108 must decide whether there has been non-compliance in the way described in the notice.

57 In *Zhao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1235 the Full Court of this Court considered a notice under s 119 of the Act. That section is in different terms from s 107. Nevertheless, we think the following statements of the Court (at [25]-[26]) are of assistance in terms of the proper interpretation and application of s 107:

Section 119 requires particulars of the grounds relied upon to be included in the notice. The level of particularity is not specified. It must serve the statutory purpose. That is to say it must be sufficient, when read in conjunction with the supporting information, to fairly inform the visa holder of the basis upon which cancellation is being considered so that the visa holder is adequately equipped to provide such relevant information as may be available and to make such submissions as may be open.

...

The requirement of notification of grounds of possible cancellation is not a requirement for delivery of some form of pleading which may then be the subject of strict construction and technical criticism. The overall purpose to be served by s 119 is procedural fairness and it is that which informs the construction and application of the section.

58 The Court, testing the matter by reference to the statutory purpose, refused to find that an erroneous reference to a regulation rendered the notice ineffective for non-compliance with s 119.

59 In *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (“*Minister for Immigration and Citizenship v SZIZO*”) the High Court considered whether any departure from the provisions of ss 441G and 441A of the Act resulted in invalidity. The Court decided that that was not the intention of Parliament and that consideration had to be given to the extent and consequences of the departure. The Court said (at 640 [35] [36]):

While the legislature may be taken to have intended that compliance with the steps in

ss 441G and 441A would discharge the Tribunal's obligations with respect to the giving of timely and effective notice of the hearing, it does not follow that it was the intention that any departure from those steps would result in invalidity without consideration of the extent and consequences of the departure. The respondents acknowledge that they suffered no injustice by reason of the Tribunal's omission and they do not take issue with the Full Court's characterisation of the result in the circumstances as being "rather absurd". The admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing. In a case in which the Tribunal fails to comply with the requirements for the giving of notice of a hearing, the factual determination of whether the applicant for review and his or her authorised recipient received timely and effective notice of the hearing does not require the court to consider how the applicant might have presented his or her case differently had the Tribunal complied with the statutory procedures. No question arises, in the case of an applicant who has received timely and effective notice of the hearing, of the loss of an opportunity to advance his or her case.

Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.

60 60 The Court in *Minister for Immigration and Citizenship v SZIZO* was dealing with different statutory provisions in the Act from those in issue in this case. Nevertheless, we think that a similar approach should be taken in the case of ss 107, 108 and 109 of the Act particularly as the phrase in s 107(1)(a) "particulars of the possible non-compliance" can only be given meaningful content by reference to the facts of a particular case.

61 61 In our opinion, it was not Parliament's intention that all departures from the statements made in a notice under s 107 deprive the decision-maker of jurisdiction under ss 108 and 109 to making findings of non-compliance by the visa holder in the way described in the notice. The phrase "in the way described in the notice" must be read in light of the purpose of the statutory scheme which is to ensure that the visa holder has notice of the alleged non-compliance and an opportunity to dispute the allegations and to respond to them. A departure which is minor and insignificant in the context of the facts of a particular case and which does not go to the substance of the allegations of non-compliance does not deprive the decision-maker of jurisdiction under ss 108 and 109. The departure in this case should be so characterised. The central issue in terms of the allegations of non-compliance was the accuracy or otherwise of the work reference letter from Dom's and adequate particulars of the

allegations with respect to that issue were given in the notice under s 107. Furthermore, the notice clearly referred to the date upon which the respondent lodged his application and the address to which it was sent (see [5] above). The respondent and his advisers would not have been under any misapprehension as to the occasion upon which it was said that he had failed to comply with s 103 of the Act. Finally, even if the bogus document was given, presented or provided to an authorised system, it seems clear enough that eventually it would have come to the attention of an officer of the Department.

62 We uphold the appellant's challenge to the Federal Magistrate's conclusion with respect to the s 107 notice issue.

The s 359A issue

63 The appellant put two alternative submissions in relation to the s 359A issue. First, he submitted that the Federal Magistrate erred in concluding that the Tribunal's letter dated 19 November 2010 did not comply with s 359A. Secondly, he submitted that s 359A did not apply to the information referred to in the Tribunal's letter because one of the exceptions in subsection 359A(4) applied. He submitted that the information was contained in the Delegate's record of decision which had been attached to the respondent's application for a review to the Tribunal. It was therefore information the respondent gave for the purpose of the application for review and within the exception in paragraph 359A(4)(b). The respondent submitted that the Federal Magistrate's decision should be upheld. He submitted that the appellant should not be permitted to raise his second submission because it had not been raised in the Federal Magistrates Court.

64 The respondent sought to raise his own further argument which had not been raised in the Federal Magistrates Court. He contended that the Tribunal's letter was deficient because it did not identify how the information referred to in the letter was relevant to the review of the decision to cancel the respondent's visa.

65 65 We start with the appellant's first submission.

66 66 There have been a number of cases dealing with the matters which constitute "information" for the purpose of s 359A or s 424A of the Act. These cases have generally involved an allegation that the Tribunal failed to include matters in a letter sent under either section or failed to send a letter.

67 67 In *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471, Finn and Stone JJ said (at 476-477 [24]) that "information" in s 424A refers to knowledge of relevant facts or circumstances communicated to or received by the Tribunal. Their Honours said that it did not include the Tribunal's "subjective appraisals, thought processes or determinations" and nor did it extend to "identified gaps, defects or lack of detail or specificity in or to conclusions arrived at by the tribunal in weighing the evidence by reference to those gaps, etc". In *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18] the plurality approved of those latter observations. In *SZJBD v Minister for Immigration and Citizenship* (2009) 179 FCR 109 at 133 [104] Buchanan J (with whom Perram J agreed) excluded from the ambit of information in s 424A intermediate findings of fact and "any process of comparison between the applicant's answers and the factual statements with which those answers were compared".

68 68 Paragraph (a) of the Tribunal's letter dated 19 November 2010 contains an intermediate or final finding of fact and an observation of inconsistency. Paragraph (b) contains information within s 359A(1) of the Act. Paragraph (d) is a mixture of an allegation of knowledge, an allegation of fact and an allegation of law. Even though it does not matter whether the non-compliance was deliberate or not (s 111), the relevance of knowledge is presumably to the discretion with respect to which one of the prescribed circumstances in reg 2.41 of the Migration Regulations 1994 is "the circumstances in which the non-compliance occurred".

69 69 The presence of (a) and (d) in the Tribunal's letter dated 19 November 2010 does not lead to the conclusion that the Tribunal did not comply with s 359A, and the Federal Magistrate did not base his decision on that ground.

70 70 The Federal Magistrate based his decision on the presence of paragraph (c). He said that it was an assertion that the Tribunal had information that the intermediary had obtained a false work reference letter for the respondent whereas in fact that was an inference from the information contained in paragraph (b). The Tribunal asserted that it had information which it did not have and that meant that it provided “false and misleading particular”.

71 71 With respect, we think the Federal Magistrate erred. The question is not whether the Tribunal provided particulars of the information available to it, but whether it has provided clear particulars of any information that the Tribunal “considers would be the reason, or a part of the reason for affirming the decision that is under review”. Accepting for present purposes the Federal Magistrate’s characterisation of paragraph (c), nevertheless, it is one thing to say that it is not information and need not of itself be the subject of a letter or notice under s 359A(1), it is another thing to say that its inclusion in a letter or notice leads to the conclusion that the Tribunal has not complied with s 359A. However, it is not necessary for me to pursue this line of reasoning any further because we think the Federal Magistrate erred in his characterisation of paragraph (c).

72 72 It seems to us that the thrust of paragraph (c) is in fact an allegation of knowledge of falsity in connection with the TRA letter. It is by no means obvious that the Tribunal is asserting that it had “direct” information that the respondent had obtained the work reference letter from the intermediary. It seems to us that in the context of the statements made in paragraph (b) it is more likely an assertion of an inference to be drawn and we note that when the respondent’s solicitors came to respond to the Tribunal’s letter one of the things they said was that:

No evidence has been provided that this intermediary has identified Mr Brar as having purchased a reference.

73 73 As with paragraphs (a) and (d) the inclusion of an inference or intermediate or final finding of fact in paragraph (c) does not lead to the conclusion that the Tribunal failed to comply with s 359A.

74 74 The appellant’s second submission that s 359A of the Act did not apply to the information in the Tribunal’s letter because it was information that the respondent gave for the purpose of the application for review was not raised before the Federal Magistrate. It is

raised in the appellant's notice of appeal. In view of our conclusion in relation to his first submission it is not strictly necessary for us to consider it. However, we will indicate our view of the submission because of the contention the respondent seeks to raise. We would decide the submission in the appellant's favour because it seems to us that the information in the Tribunal's letter is substantially the same as that in the Delegate's record of decision and, following the decision of Sundberg J in *Minister for Immigration and Citizenship v Chamnam You* [2008] FCA 241, the information given to the Tribunal need not be information an applicant relies on. In those circumstances, the exception in s 359A(4)(b) applied.

75 75 The respondent's contention (see [64] above) was not raised before the Federal Magistrates Court and was not even the subject of a notice of contention. We would not be disposed to allow the respondent to raise it. Even if it is appropriate to allow the respondent to raise it, the contention could not succeed in light of our acceptance of the appellant's second submission.

Other Grounds

76 76 The Federal Magistrate did not deal with other grounds of review being grounds 1 and 6 (reasonable apprehension of bias) ground 2 (imposition of an inappropriate onus), ground 5 (failure to comply with s 425 of the Act), ground 7 (breach of procedural fairness and no evidence for certain findings of fact) and grounds 9 and 10 (failure to apply or apply properly reg 2.41 of the Migration Regulations). In those circumstances the matter will have to be remitted to the Federal Magistrates Court.

CONCLUSIONS

77 77 The appeal must be allowed. The orders made by the Federal Magistrate must be set aside and the proceeding will have to be remitted to the Federal Magistrates Court for that Court to deal with the remaining grounds of the application for judicial review and the costs of that application including costs to date. We would make the following orders:

1. The appeal be allowed.
2. The declarations and orders made by the Federal Magistrates Court on 28 July 2011 be set aside.

3. The proceeding be remitted to the Federal Magistrates Court for hearing and determination of the remaining grounds of the applicant's Amended Application dated 17 May 2011, being grounds 1, 2, 5, 6, 7, 9 and 10 and the costs of that application including costs to date.
4. The respondent pay the appellant's costs of the appeal.

I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North, Greenwood and Besanko.

Associate:

Dated: 21 March 2012